

19. Rights of Sexual and Gender Minorities

Tikanga Taera me te Tangata Taitini



“People of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.”

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The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, Article 1

Introduction

Tīmatatanga

WHAT ARE HUMAN RIGHTS IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY?

All people, regardless of their sexual orientation or gender identity, have the same human rights and freedoms. All sexual and gender minorities in New Zealand have these rights. This includes people who identify as gay, lesbian, bisexual, takataapui, intersex, transgender, whakawāhine, tangata ira tane, fa'afafine or fakaleiti.

Human rights in relation to sexual orientation or gender identity include, for example, the rights to:

- freedom from discrimination
- recognition as a person before the law
- life, liberty and security of the person
- freedom from arbitrary detention and to a fair trial
- an adequate standard of living, including decent work and housing
- education
- health and protection from medical abuses
- found a family
- participate in public life and in cultural life
- freedom of expression
- freedom of association and peaceful assembly
- freedom of thought, conscience and religion.

These rights provide a framework of equality, security and participation. This chapter uses this framework to assess the status of human rights in relation to sexual orientation and gender identity for sexual and gender minorities in New Zealand, and outlines some of the main

developments for sexual and gender minorities since the Commission's status report on human rights in 2004.¹

Language and terminology are particularly important to sexual and gender minorities. The words people choose to describe themselves can both affirm and challenge constructs of identity. At the same time, the absence of inclusive language can cause barriers to participation and reinforce exclusion. The broad terms used to describe groups – for example, children and young people, people with disabilities or people from diverse ethnic groups – can also obscure the richness of diversity within those groups.

People who would today be described as sexual and gender minorities have always lived in New Zealand societies. Historical accounts confirm that traditional indigenous Māori communities included people with a diversity of sexual orientations and gender identities, including takataapui (a term for close friends of the same sex), whakawāhine and tangata ira tane (terms for trans women and trans men respectively). Some Pacific communities in New Zealand use terms that Pacific countries have traditionally used to recognise people born biologically male who embody the spirit of a woman, have female gender expressions, and perform female as well as male gender roles. Pacific language terms include fa'afafine (Samoa), fakaleiti (Tonga), akava'ine (Cook Islands), vaka sa lewa lewa (Fiji) and fafafine (Niue).²

Pākehā/European communities in New Zealand also have a history of diverse terms to describe sexual and gender minorities. Today the terms most commonly used to describe sexual orientation include gay, lesbian and bisexual. The word queer has been reclaimed by some, particularly younger people, as a generic term for sexual minorities. In these communities, the word trans is increasingly being used as a broad, neutral term for people whose gender identity differs from their biological sex. It includes, for example, female to male (FtM) and male to female (MtF) transsexual and transgender people, cross-dressers and those who identify as androgynous or genderqueer.

1 Human Rights Commission (2004), *Human Rights in New Zealand Today – Ngā Tika Tangata o te Motu* (Wellington: HRC)

2 For a brief overview of the Pacific region, see Pacific Sexual Diversity Network (2009), *HIV/AIDS, Men who Have Sex with Men and Transgender People in the Pacific: recommendations for an improved response* (Sydney: Pacific Sexual Diversity Network and AIDS Council of New South Wales). Accessed 13 August 2010 from <http://www.acon.org.au/sites/default/files/PSDN-Advocacy-Report-2009-online.pdf>

The word trans will be used in this report, but it is important to note that the term is contested and that people have the right to self-identify and use terms that best describe their sex, gender identity and/or gender expression. Some people argue that use of trans risks obscuring the diversity of people who are supposed to be represented within the broader term. Many terms used to discuss sexual and gender identities are contested, and some intersex people and some trans people consider that their experiences are better described as sex diversity.

In New Zealand, the term intersex has predominantly been used to describe medical conditions where a person's physical body or chromosomes differ from what is considered standard for a male or a female. However, a small and increasingly visible number of people have reclaimed the term as an identity, and are using this as a basis for raising awareness about issues for intersex people.

In this report, sexual and gender minorities refers to lesbian, gay, takataapui, bisexual, intersex, trans and gender-diverse people, including those with culturally diverse constructs of gender identity.³ New Zealand is progressive in the formal legal equality protections provided to most sexual and gender minorities. Yet full legal equality has not been achieved; discrimination remains and appears pervasive in some areas; and barriers exist in the pathways to equality and security for some groups.

International context Kaupapa ā taiao

Despite international human rights standards applying to all people, everywhere, the international context has been characterised by tensions in states' discussions of sexual orientation and gender identity. These tensions have emerged from the historical absence of a specific human rights standard in relation to sexual orientation

and/or gender identity and in the light of steps towards inclusion.⁴ Tension has been evident, for example, in debate at the United Nations about the human rights of sexual and gender minorities. Some states consider the issue to be one of simply applying existing human rights standards, because the principles of universality and non-discrimination mean such human rights protections automatically apply to all people. Others are opposed to discussion about sexual and/or gender minorities.

There have been concrete steps to increase the visibility of the human rights of sexual and gender minorities across the United Nations system, in regional and sub-regional meetings, regional courts and other international fora. Through this visibility there has been clear progress in securing protection of existing human rights standards. However, there has been strong opposition to such visibility or perceived extension of protection. Examples are the opposition to General Assembly resolutions and the accreditation to the United Nations of international non-government organisations which focus on these minorities.⁵ In general, there has been increasing reference to the human rights of sexual and gender minorities, wider application of existing human rights standards, and new dialogue about these rights. Increasingly, the scope of issues has extended from a sole focus on sexual orientation to including concerns about gender identity and gender minorities. Less attention has been paid to sex diversity and the specific concerns of intersex people.

APPLICATION OF EXISTING INTERNATIONAL LAW

The major human rights treaties have been used to challenge a range of human rights violations based on sexual orientation and to uphold the application and protection of existing international law. A landmark case was *Toonen v Australia*.⁶ The United Nations Human Rights Committee upheld the claim of Nick Toonen that

3 International Lesbian and Gay Human Rights Commission (2001), *Sexual Minorities and the Work of the Special Rapporteur on Torture* (Working Paper), E/CN.4/2002/76 The term 'sexual minorities' is also contested. For example, see Miller A (2006), 'Sexual Rights Words and Their Meanings: The Gateway to Effective Human Rights Work on Sexual and Gender Diversity' (Background Paper, Yogyakarta)

4 For example, see Sanders D (2007), 'Human Rights and Sexual Orientation in International Law', *World*, 11 May. Accessed 13 August 2010 from <http://ilga.org/ilga/en/article/57>.

5 Charbonneau L, 'UN Committee Moves to Keep Out Gay-Lesbian NGO', Reuters, 3 June 2010. Accessed 13 August 2010 from <http://www.reuters.com/article/idUSTR6526BQ20100604>

6 *Toonen v Australia*, communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994)

certain Tasmanian laws prohibiting male homosexuality violated his privacy and equality rights under Article 17 of the International Covenant on Civil and Political Rights (ICCPR).⁷ The Committee subsequently ruled that sex discrimination includes discrimination based on sexual orientation.⁸

Anti-discrimination provisions in all major international human rights treaties spell out specific grounds on which discrimination is prohibited. These include the term 'or other status' to encompass unlawful discrimination against any non-specified groups. The Committee on Economic, Social and Cultural Rights has issued a 'General Comment on Non-Discrimination'. This clarifies that the definition of 'other status' in Article 2 of the convention includes sexual orientation and gender identity.⁹

Treaty bodies have expressly referred to the rights of sexual minorities, with the Committee on Economic, Social and Cultural Rights being the first to explicitly refer to sexual orientation in its General Comment on the Right to Health.¹⁰ By 2005, the principle of non-discrimination on grounds of sexual orientation had become "one that is firmly grounded in international standards, requiring not only the repeal of discriminatory criminal laws but also the adoption of proactive anti-discrimination measures".¹¹ The principle of non-discrimination also applies to other human rights. For example, in 2010 the United Nations special rapporteur on the Right to Health examined the relationship between this right and criminalisation of private, adult, consensual sexual behaviour. The Special Rapporteur concluded that criminalisation of same-sex sexual conduct was discriminatory and inconsistent with the right to health.¹²

The scope of protection is now understood to include human rights related to all sexual and gender minorities – for example, discrimination based on actual or perceived gender diversity or gender identity. An increasing number of special rapporteurs have referenced human rights violations committed against people because of their actual or perceived sexual orientation or gender identity. United Nations treaty bodies are more regularly referring to sexual orientation, gender identity, transgender people and sexuality in concluding Observations on States Parties' reports. For example, in 2010 the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Committee made observations in a number of reporting processes. These highlighted the need to protect women against discrimination on the grounds of sexual orientation, and called on the State to strengthen efforts to eliminate stereotypical images, including on the basis of sexual orientation.¹³ The committee also expressed concern at specific health problems experienced by transgender women, and stereotypes that cause multiple discrimination on grounds including sexual orientation and gender identity.¹⁴

The United Nations High Commissioner for Human Rights has also made statements affirming the rights of sexual minorities. In 2010, the High Commissioner's Office identified, in its strategic management plan, a particular focus on countering discrimination on the grounds of race, sex, religion and against others who are marginalised, including on the grounds of sexual orientation.¹⁵

Outside the United Nations, regional courts have made significant decisions upholding the human rights of sexual and gender minorities. For example, in 2002 the European

7 *ibid*

8 *Toonen v Australia Communication*, para 8.7

9 ICESCR (2009), General Comment 20: Non-Discrimination in Economic, Social and Cultural Rights, E/C12/GC/20, 25 May

10 ICESCR (2008), General Comment 14: The Right to the Highest Attainable Standard of Health, E/C12/2000/4 (2000), para 18

11 Pacific Sexual Diversity Network (2009); see also Siaz I (2004), 'Bracketing Sexuality: Human Rights and Sexual Orientation - A Decade of Development and Denial at the UN', *Health and Human Rights* 7, no. 2, pp.49-80.

12 Grover A (2010), Report of the Special Rapporteur on the Right of Everyone to the Highest Attainable Standard of Physical and Mental Health, A/HRC/14/20

13 See, for example, the CEDAW Committee's 2010 Concluding Observations in relation to the country reports of the Netherlands, Ukraine, and Panama. Accessed 22 November 2010 from <http://www2.ohchr.org/english/bodies/cedaw/cedaws45.htm>

14 The CEDAW Committee used the term "transgender women" as an umbrella term for trans women.

15 UNHCHR (2010), *Report of the United Nations High Commissioner for Human Rights*, Strategic Management Plan 2010–2011, A/HRC/13/26, pp 24, 54, 66, 68, 123

Court of Human Rights held that the British Government's failure to alter the birth certificates of transsexual people or to allow them to marry in their new gender was a breach of the European Convention on Human Rights.¹⁶ These decisions prompted the United Kingdom to pass the Gender Recognition Act, enabling trans people to obtain a gender recognition certificate that legally recognises their 'acquired' gender and sex.¹⁷

INCREASING REFERENCES TO HUMAN RIGHTS IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY

During the past decade there have been various attempts to obtain a United Nations resolution on human rights and sexual orientation, all of which have been supported by New Zealand. These attempts have been characterised by intense debate and have failed for various political and other reasons. In 2005, in response to failures of the Commission on Human Rights to reach agreement, New Zealand issued a joint statement on behalf of 32 states, noting:¹⁸

Sexual orientation is a fundamental aspect of every individual's identity and an immutable part of self. It is contrary to human dignity to force an individual to change their sexual orientation or to discriminate against them on this basis. And it is repugnant for the State to tolerate violence committed against individuals because of sexual orientation. ... we recognise that sexuality is a sensitive and complex issue. But we are not prepared to compromise on the principle that all people are equal in dignity, rights and freedoms. The Commission must uphold the principle of non-discrimination. We urge all states to recognise

this common ground and to participate in debate. We hope this Commission will not be silent for too much longer.

A second statement followed in 2006, made by Norway on behalf of 54 countries.¹⁹ The statement "affirmed the principle of non-discrimination, which requires that all human rights apply equally to every human being regardless of sexual orientation or gender identity".

The statement noted the attention paid to sexual orientation and gender identity by special rapporteurs, treaty bodies and civil society, and expressed deep concern at such human rights violations. The statement did not deal with the issue of same-sex marriage. In 1999, in *Joslin v New Zealand*, the Human Rights Committee had ruled that the "mere refusal to provide for marriage between homosexual couples ... does not disclose a violation of any provision of the International Covenant".²⁰ This ruling followed a complaint to the United Nations by two New Zealand lesbian couples, under the Optional Protocol to the ICCPR, that the failure to provide for same-sex marriage under New Zealand law amounted to discrimination on the grounds of sexual orientation.

In December 2008, Argentina issued the first broad-ranging statement on human rights, sexual orientation and gender identity to be made at the United Nations General Assembly, on behalf of 66 countries.²¹

STATEMENT ON THE APPLICATION OF PRINCIPLES OF EXISTING INTERNATIONAL LAW

In response to concerns about the application of international law and continued human rights violations, a group of human rights advocates and jurists developed a statement on the application of existing international

16 *Goodwin v United Kingdom* (2002) 35 EHRR 18 and *I v United Kingdom* (2003) 36 EHRR 53

17 Gender Recognition Act (United Kingdom). Accessed 13 August 2010 from http://www.opsi.gov.uk/acts/acts2004/pdf/ukpga_20040007_en.pdf

18 New Zealand joint statement on promotion and protection of human rights, Commission on Human Rights, 61st session, 15 April 2005. Accessed 13 August 2010 from <http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2005/0-15-April-2005a.php>

19 Norwegian joint statement on human rights violations based on sexual orientation and gender identity, Human Rights Council, 3rd Session, Geneva, 1 December 2006. Accessed 13 August 2010 from <http://ilga.org/ilga/en/article/944>

20 *Joslin v New Zealand*. Communication no. 902/1999 CCPR/c/75/D/902/1999, p 9, para 8.3

21 Argentinean joint statement on human rights, sexual orientation and gender identity, United Nations General Assembly, 63rd session, Geneva, 22 December 2008. Accessed 13 August 2010 from <http://www.ighrc.org/binary-data/ATTACHMENT/file/000/000/311-1.pdf>

human rights standards to sexual orientation and gender identity. The resulting document is known as the 'Yogyakarta Principles'.²²

The Yogyakarta Principles have since become widely recognised as a useful statement of international human rights law. They are used as a means for monitoring state performance in relation to the rights of sexual and gender minorities. They have also been used to advocate for the promotion and protection of the human rights of these minorities. For example, some states have commented on the situation of sexual and gender minorities in their Universal Periodic Review reports or during that review process. As a result, some states have agreed to apply the Yogyakarta Principles domestically.²³ The principles were also cited by the Committee on Economic, Social and Cultural Rights in its General Comment on Non-Discrimination in Economic, Social and Cultural Rights, stating that the definition of 'other status' includes sexual orientation and gender identity.²⁴

The Yogyakarta Principles recommend that national human rights institutions "promote respect for these principles by state and non-state actors, and integrate into their work the promotion and protection of the human rights of persons of diverse sexual orientations or gender identities".²⁵ In response, the Asia-Pacific Forum of National Human Rights Institutions (APF) convened a meeting in 2009 to discuss the principles. This was the first time a group of national institutions had met to discuss human rights in relation to sexual orientation and gender identity. The meeting considered evidence from

the Asia-Pacific region and concluded that discrimination on the grounds of sexual orientation and gender identity is a serious problem in many countries across the region.²⁶ The APF Council subsequently asked the Advisory Council of Jurists to carry out a review of the laws and policies of the 17 countries in the region in relation to sexual orientation and gender identity. The council is due to report to the APF in 2011.²⁷

NEW DIALOGUE

Intersections between human rights in relation to sexual orientation and gender identity and other human rights are increasingly apparent. For example, in the area of disability rights, Article 25 of the Convention on the Rights of Disabled Persons expressly refers to states' obligations to ensure that disabled people have the same sexual and reproductive health and population-based health programmes as other people. In the area of race discrimination, the International Lesbian and Gay Association–Europe has drawn attention to the issue of multiple discrimination (on grounds of race, nationality, religious belief, gender, sexual orientation and gender identity). It has called for European Union member states to adopt a proposed EU directive to address multiple discrimination.²⁸

In the area of sex discrimination, the Council of Europe's seventh Conference of Ministers Responsible for Equality between Women and Men recognised the need to combat sexual orientation and gender identity discrimination against women, girls and trans people. The conference adopted an action plan which recommends that the

22 The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (2007). Accessed 13 August 2010 from http://www.yogyakartaprinciples.org/principles_en.pdf

23 The Universal Periodic Review Process is a new process by which member States of the United Nations may be 'peer-reviewed' on their human rights performance. Further information available on the Commission's website at <http://www.hrc.co.nz/home/hrc/internationalhumanrights/nzsnationaluniversalperiodicreviewuprreport/nzsnationaluniversalperiodicreviewuprreport.php>

24 ICESCR (2009)

25 The Yogyakarta Principles (2007), recommendation 28

26 Asia-Pacific Forum of National Human Rights Institutions (2009), Conclusions of the Workshop on the Role of National Human Rights Institutions in the Promotion and Implementation of the Yogyakarta Principles. Accessed 13 August 2010 from http://www.asiapacificforum.net/issues/sexual_orientation

27 Asia-Pacific Forum of National Human Rights Institutions (2009). Accessed 13 August 2010 from <http://www.asiapacificforum.net>

28 International Lesbian and Gay Association (2010), Statement on the occasion of International Day for the Elimination of Racial Discrimination (21 March). Accessed 13 August 2010 from http://www.ilga-europe.org/home/news/latest_news/ilga_europe_s_statement_on_the_occasion_of_international_day_for_the_elimination_of_racial_discrimination

Council of Europe “undertake research on the situation of lesbian, bisexual and transgender women, with a view to drafting specific guidelines on preventing and combating all forms of discrimination against them”.²⁹

New Zealand has reported on the human rights situation of sexual and gender minorities in its United Nations treaty body reports. For example, the Universal Periodic Review (UPR) included a section on equality and non-discrimination, referring explicitly to sexual orientation and the situation of trans people.³⁰ Priority should also be given to reporting on the status of sexual and reproductive rights.

SEXUAL AND REPRODUCTIVE RIGHTS AND IDENTITY

Sexual and reproductive rights are central to human rights. Sexual rights are the norms that emerge when existing human rights standards are applied to sexuality.

An identity-based approach to sexual rights is necessary in order to fulfil the right to self-determination, and to increase visibility, create community and overcome stigma and isolation. However, taking only an identity-based approach can lead to a failure to acknowledge the sexual rights of those who do not, or do not wish to, ‘fit’ an identity category. The International Planned Parenthood Federation’s declaration on sexual rights states:

Sexual rights protect particular identities, but reach beyond this and protect all people’s right to be allowed to fulfil and express their sexuality, with due regard for the rights of others and within a framework of non-discrimination.³¹

New Zealand context Kaupapa o Aotearoa

LEGISLATIVE FRAMEWORK

In just over 25 years, New Zealand has moved from a society where homosexual activity was illegal to one that promotes tolerance and understanding by respecting the diversity of individuals of all sexual orientations and, increasingly, diverse gender identities. This progress would not have been possible without years of activism and advocacy by civil society groups and the courage displayed by those who spoke out publicly as gay, lesbian, bisexual, trans and intersex people.

New Zealand’s domestic laws have progressed from decriminalisation of homosexuality, based on a conscience vote in Parliament, to positive protection from discrimination on the grounds of sexual orientation.³² In the past five years, this has moved to include many aspects of partnership recognition. This sequence of law reform is common to many states that have recognised human rights in relation to sexual orientation. Today the legislative framework is anchored across key general non-discrimination laws and a wider range of specific laws in relation to welfare, property and legal recognition of registered partnerships. The legislative framework of human rights in relation to gender identity is less comprehensive.

The right to freedom from discrimination is enshrined in section 19 of the New Zealand Bill of Rights Act 1990 (BoRA). The scope of section 19 is limited by its cross-reference to the prohibited grounds of discrimination in section 21 of the Human Rights Act 1993 (HRA). Section 21 was amended in 1993 to prohibit discrimination on the grounds of sexual orientation (which is defined to include heterosexual, homosexual, lesbian or bisexual orientation).

29 ‘Council of Europe Baku conference calls for further action to make equality between women and men a reality’, edited release from seventh Conference of Ministers responsible for Equality between Women and Men, 25 May 2010. Accessed 13 August 2010 from [https://wcd.coe.int/ViewDoc.jsp?Ref=PR418\(2010\)&Language=lanEnglish&Ver=original&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE](https://wcd.coe.int/ViewDoc.jsp?Ref=PR418(2010)&Language=lanEnglish&Ver=original&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE)

30 Accessed 15 November 2010 from <http://www.mfat.govt.nz/Foreign-Relations/1-Global-Issues/Human-rights/Universal-Periodic-Review/Final-Report/index.php>

31 Accessed on 15 November 2010 from <http://www.ippf.org/en/Resources/Statements/Sexual+rights+an+IPPF+declaration.htm>

32 For an overview of the steps towards decriminalisation, see Ministry for Culture and Heritage (n.d.), ‘Homosexual Law Reform in New Zealand’, updated 4 July 2010, accessible online at <http://www.nzhistory.net/culture/homosexual-law-reform/homosexual-law-reform>

The Commission accepts complaints of unlawful discrimination from gender minorities (trans or intersex people) under the ground of sex. The Commission has interpreted sex to include gender and gender identity.³³ In 2004, the Human Rights (Gender Identity) Amendment Bill was introduced as a parliamentary private member's bill.³⁴ The bill would have added gender identity as a prohibited ground of discrimination. In response to the bill, the Attorney-General requested a Crown Law Office opinion on whether such an amendment was necessary. The office concluded that trans people were already protected under the ground of sex in the HRA, because sex could be legally interpreted to include gender and gender identity.³⁵ As a result, the bill was withdrawn. The need to include gender identity as an explicit ground under the HRA, however, is highlighted by groups who are particularly vulnerable to discrimination (including trans sex workers) and typically are not aware that they are protected under the ground of sex.

During the Consistency 2000 project, the Commission reviewed New Zealand legislation to ensure its consistency with domestic and international human rights standards. The Commission's 1998 report highlighted discriminatory treatment of same-sex relationships, compared with their opposite-sex counterparts.³⁶ A process for law reform commenced and, over the following years, laws relating to sexual orientation were amended. These included:

- the Property (Relationships) Amendment Act 2001, which generally gives same-sex and de facto heterosexual couples the same property rights and obligations as married couples on the breakdown of a relationship
- the Administration Act 2001, which gives same-sex partners access to the same rights and entitlements as married partners in relation to the estate of a deceased partner who has not left a will

- the Family Protection Amendment Act 2001, which provides same-sex partners with rights and legal standing to make a claim against a deceased partner's estate, including when the deceased's will is out of date or the deceased has failed to make provision for the surviving partner
- the Family Proceedings Amendment Act 2004, which extended maintenance provisions after a relationship ends to cover civil union and de facto couples
- the Status of Children Act 2004, which gives the same-sex partner of a birth mother the same legal parental status as an opposite-sex partner when an assisted human-reproduction procedure has been used to conceive a child and that partner has consented to the procedure. A partner may also be a child's legal guardian
- same-sex partners being accorded the same legal protections as heterosexual partners under the Domestic Violence Act 1995
- the Relationships (Statutory References) Act 1995, which amended a number of laws to remove provisions that discriminated on the grounds of sexual orientation. Amendments were made to a range of legislation, including immigration, social welfare and relationship property, with wide-ranging implications. Resulting amendments to the Social Security Act 1964 were significant and resulted in all welfare programmes, policies and procedures being rewritten to ensure that same-sex relationships were given equal recognition and treatment.

This programme of law reform has not yet been fully reviewed to ascertain its effectiveness in practice, or any difficulties faced by same-sex couples.

The Civil Union Act 2004 allows same-sex and opposite-sex couples to register their relationships as civil unions

33 See the definitions of 'sex' and 'gender' in the chapter on human rights and women.

34 Human Rights (Gender Identity) Amendment Bill. Accessed 13 August 2010 from <http://legislation.knowledge-basket.co.nz/gpprint/docs/bills/20042251.txt>. See also Human Rights (Gender Identity) Amendment Bill 2004 (member's bill, Georgina Beyer): Bills Digest No 1168. Accessed 13 August 2010 from <http://www.parliament.nz/NR/rdonlyres/941DC4F3-BA6A-47FA-B3F2-8565AC7B2BB3/41001/1168GenderIdentity1.pdf>.

35 Office of the Attorney-General, Crown Law opinion on transgender discrimination, media release, 22 August 2006. Accessed 13 August 2010 from <http://www.beehive.govt.nz/release/Crown+law+opinion+transgender+discrimination>

36 Human Rights Commission (1998), Report to the Minister of Justice Pursuant to Section 5(1)(k) of the Human Rights Act 1999, Consistency 2000 (Wellington: HRC). Accessed 13 August 2010 from <http://www.courts.govt.nz/publications/publications-archived/1998/human-rights-commission-report-consistency-2000-december-1998>.

under the Birth, Deaths and Marriages Registration Act 1995. Since 2004, 1876 civil unions have been registered. In 2009, 312 civil unions were registered, with 78 per cent being same-sex unions. The Civil Unions Recognised Overseas Relationships Regulations 2005 recognise civil unions registered in Finland, Germany, the United Kingdom, New Jersey and Vermont (United States of America). In 2009, 58 such civil unions were recognised.

Remaining areas where heterosexual people have different legal rights from sexual and gender minorities relate primarily to family life. Same-sex marriage is not permitted under the Marriage Act 1955, which has been interpreted by the New Zealand Court of Appeal as prohibiting marriages of two persons of the same sex.³⁷ There have been attempts to explicitly exclude same-sex couples from marriage legislation. The Marriage (Gender Clarification) Amendment Bill was introduced in 2005 by a member of parliament. It sought to add a provision to the Marriage Act 1955, stating that marriage means a union between a man and a woman and not between two persons of the same sex. The bill also sought to amend the BoRA to specify that measures taken in good faith for the purposes of assisting or advancing marriage do not constitute discrimination. The bill was defeated at its first reading by 73 votes to 47.

Anything less than full legal recognition of same-sex relationships is of particular concern for vulnerable couples, including older people in residential care and/or when power of attorney is being exercised on their behalf.

The Adoption Act 1955 provides that 'two spouses' or any individual, regardless of their sexual orientation, are eligible to adopt in New Zealand. The term 'spouse' has been interpreted as enabling only married couples to adopt jointly. In June 2010, the High Court had to consider whether the expression 'spouses' in section 3 of the Adoption Act 1955 can include a man and a woman who are unmarried but in a stable and committed relationship. It decided that such an interpretation was permissible and that reading 'spouses' to mean that only married couples may adopt jointly seemed to discriminate against other

types of relationships which were commonplace in New Zealand. However, the court limited its consideration of the issue to heterosexual opposite-sex couples, the status of the applicants in this case.³⁸ The current legal position, therefore, is that same-sex couples are unable to jointly adopt a child.

Given that a lesbian woman or gay man can apply to adopt a child as a sole applicant, and that same-sex couples can share the parenting of a child as legal guardians, it is anomalous and discriminatory under the Human Rights Act and the Bill of Rights Act that a same-sex couple cannot adopt a child jointly.

Other countries have recently changed their law to permit same-sex couples to adopt a child jointly. In England and Wales, the Adoption and Children Act 2002 broadened the eligibility criteria to allow unmarried couples, including same-sex couples, to adopt a child. Scotland has also recently followed the same path. It is time for New Zealand to follow suit by amending the Adoption Act to permit same-sex couples to jointly adopt a child, as part of reforms to this act making the best interests of the child the paramount consideration.

A birth parent's same-sex partner can be listed as 'other parent' on a child's birth certificate. However, there are conflicting legal views on the exact status of an 'other parent'. Some 'other parents' have applied for and been granted guardianship status from the Family Court, in addition to parenting status. However, concern remains around guardianship and access rights, in the event of a relationship dissolution or death of the named parent.

New Zealand has made some limited progress in affirming the legal rights of trans people. For example, a 2009 Family Court decision, *Re Michael*, stated that full gender reassignment surgery is not always necessary for a trans person to change sex details on a birth certificate.³⁹ However, significant challenges remain.

Section 30(2) of the Births, Deaths, Marriages and Relationships Registration Act 1995 prevents a trans person who transitions after marrying from changing sex details on their birth certificate. This requirement reflects the

37 *Quilter v Attorney-General* [1998] 1 NZLR 523

38 *Re AMM* [2010] NZFLR 629

39 *Michael v Registrar-General of Births, Deaths and Marriages: judgment of Judge A J Fitzgerald: a declaration as to sex* (Family Court, Auckland 2009) FAM-2006-004-002325

current prohibition on same-sex marriages. As a result, a trans person is effectively required to take the preliminary step of dissolving their marriage or changing it to a civil union. This legal restriction applies only to changing sex details on a birth certificate. The Department of Internal Affairs has clarified that if a married trans person applies for a Family Court declaration to amend their sex details, that document can be used to update those details on a passport.⁴⁰ Trans people have also requested clarification around what steps are necessary in order for their appropriate sex details to be recorded on a death certificate.

There are also restrictions on whether a trans person who has changed their sex details on a birth certificate is able to marry as that sex. In *Attorney-General v Family Court*, the High Court held that it is possible for a trans woman to be recognised as female and marry a man, and for a trans man to marry a woman.⁴¹ However, the legal threshold in this 1995 High Court case was that the person must have reached 'the end of the continuum' in terms of their physical transition process. The judge held that the minimum requirement would be vaginoplasty for a trans woman and a full hysterectomy and mastectomy for a trans man. This threshold is likely to exclude the majority of trans people from the right to marriage.

In 2008, the Family Court also held that the word 'interminate' should have been recorded on an intersex person's original birth entry. This correction was made under section 85 of the Births, Deaths and Marriages Registration Act 1995.⁴²

MECHANISMS TO ENHANCE PROTECTION

Anti-discrimination legislation alone is not sufficient to ensure the protection of the human rights of sexual and gender minorities. Policy and practices also have to be proactively developed and reviewed to ensure that the human rights of these communities are being protected. Public education and training for those responsible for developing and delivering public services is also necessary.

Alongside legal measures to ensure freedom from discrimination, a small 'Gay, Lesbian, Bisexual, Transgender and Intersex' (GLBTI) policy function was established within the Ministry of Social Development in 2004. It oversaw a work programme that focussed on assisting government agencies to meet their obligation to develop policies and practices consistent with the Human Rights Act. In 2009, the Ministry mainstreamed the GLBTI policy role, including the people and work programme, into its core policy function.

New Zealand today Aotearoa i tēnei rā

As the previous section illustrates, successive New Zealand governments have taken steps to remove the legal barriers that prevent sexual and gender minorities, particularly lesbian, gay and bisexual people, from being able to exercise their human rights. The Commission's status report on human rights in 2004 highlighted outstanding human rights issues for trans and intersex people. There have been significant developments since then, including the Commission's Transgender Inquiry. This chapter assesses the current human rights situation for sexual and gender minorities in three broad areas: equality, participation and security.

EQUALITY

Equality is affirmed by visibility, because it acknowledges a person's place in society. In New Zealand, the visibility of diverse sexual and gender minorities helps to prevent stereotyping and remove barriers to equal participation.

Visibility is a particular issue for sexual and gender minorities in relation to data collection. Official estimates of populations defined by sexual orientation and gender identity and relevant data on discrimination and social wellbeing are needed to monitor human rights status and to evaluate the economic, social, cultural and other impacts of policy and legislation on sexual and gender

40 Human Rights Commission correspondence with the Department of Internal Affairs, 2010

41 The legal test for a trans person's ability to marry is set out in *M v M* [1991] NZFLR 337 and *Attorney-General v Family Court at Otahuhu* [1995] NZLR 603 and discussed in the *Re Michael* decision.

42 *R v The Registrar General of Births, Deaths and Marriages* (unreported, Wellington, October, 2008). Note that the original birth entry was created under the previous legislation, the Births and Deaths Registration Act 1951. In 1995 the Births, Deaths and Marriages Registration Act was enacted. It was renamed the Births, Deaths, Marriages and Relationships Registration Act in 2009.

minorities. For example, the limited statistical information available about the lesbian population limits the health sector's ability to monitor the health risks that lesbians face. Reliable data is also often required when agencies are seeking funding to provide services to target specific needs within the community. Lack of data may therefore lead to a lack of funding for community services.

No official data is collected about sexual orientation. This is of particular concern to those civil society groups and individuals who have lobbied unsuccessfully for data collection for many years. The absence of a question on sexual orientation in the census and in population-based surveys, especially health surveys, is viewed by some as discriminatory. Data is collected on other forms of identity⁴³ protected from discrimination under New Zealand law, such as ethnicity, marital and family status, and religious belief. This issue echoes concerns raised about the lack of adequate data on disability in official statistics.⁴⁴

A key question, which has not been legally tested, is the relationship between the Human Rights Act, the Bill of Rights Act and the Statistics Act 1975.

In 2002 and 2006, the Human Rights Commission received a complaint stating that the failure to include a sexual-orientation question in the New Zealand Census amounted to discrimination under the Human Rights Act 1993. Furthermore, it said, Statistics New Zealand had failed to meet its statutory obligation to collect information that would inform government policies and enable communities to make a case for resources.

The Commission's mediation process was not able to resolve the 2002 complaint and the complainant was referred to the Office of Human Rights Proceedings. A sexual-orientation question was not included in the 2006 Census, and a second complaint was made to

the Commission, though this was not resolved. The complainant applied to the Office of Human Rights Proceedings for legal representation to take this case to the Human Rights Review Tribunal. A decision about whether or not to provide legal representation was deferred while the complainant used other avenues to discuss these issues with Statistics New Zealand.

In 2010, the absence of a sexual-orientation question in the New Zealand Health Survey resulted in several submissions to the Ministry of Health, expressing concern at the continuing lack of appropriate data collection. One group submission was made on behalf of 37 key stakeholders.⁴⁵

The Commission's 2004 report noted that the lack of official data collection, including any census question on sexual orientation, was a serious impediment to advancing the rights of sexual and gender minorities.⁴⁶ Concerned at the lack of progress, in 2009 the Commission convened a roundtable with Statistics New Zealand and lesbian, gay and bisexual community leaders to discuss the official collection of sexual orientation data. A clear community view emerged that the absence of a question on sexual orientation was regarded as a fundamental violation of the rights to equality, participation and security. Concerns were expressed that the lack of official data limited the State's ability to measure health, social and other outcomes and identify policy priorities for lesbian, gay and bisexual people.

Statistics New Zealand has expressed concern that homophobia and discrimination may result in negative reactions to a sexual-orientation question.⁴⁷ This may result in a poor-quality census response or in resistance, undermining the veracity of the data. The Commission has recommended that Statistics New Zealand establish an advisory group to enable consultation with diverse

43 Identity is only one component of sexual orientation, alongside attractions and behaviour.

44 For more information, see the chapter on the rights of disabled people.

45 Saxton P et al (2010), submission to the Ministry of Health regarding the New Zealand Health Survey on behalf of key sexual orientation data collection stakeholders in New Zealand; New Zealand AIDS Foundation (2010), Submission on New Zealand Health Survey Discussion Paper

46 Human Rights Commission (2004), chapter 19

47 Statistics New Zealand (2003), Sexual Orientation Focus Group Research, accessible online at http://www.stats.govt.nz/browse_for_stats/people_and_communities/marriages-civil-unions-and-divorces/sexual-orientation-focus-group-research.aspx

lesbian, gay and bisexual communities around the collection of sexual orientation data.⁴⁸

Statistics New Zealand has produced a discussion paper⁴⁹ and commissioned the Sexual Orientation Data Collection Study (SODCS) to look at technical concerns around collecting sexual orientation data in probability surveys.⁵⁰ The SODCS concluded that “identified measurement and data collection issues relating to sexual orientation data are all amenable to resolution to a degree that would ensure the collection of timely, accurate, reliable, comparable and high-quality sexual-orientation data in New Zealand”.⁵¹ It considered that the data collection approach developed by the Office for National Statistics in the United Kingdom was an appropriate model for New Zealand. The study further recommended that this model should be tailored to encompass local cultural perspectives on sexual orientation, particularly those of Māori, Pacific and Asian peoples. Importantly, the study produced sexual orientation conceptual, measurement and data-collection frameworks tailored to New Zealand’s Official Statistical System.

Data collection issues for gender minorities are less clear-cut. Among trans people there is no single view about whether gender identity data should be collected,⁵² nor should a single view be expected. Many trans people have a strong preference to be recognised as simply male or female, as this is their chosen sex and gender identity. Other trans and intersex people have indicated their preference for a third ‘sex’ category, as long as there is no requirement that all trans and intersex people would be required to select that option. This reflects concerns about the need for greater visibility to combat prejudice, enhance participation and identify policies required

to address human rights issues faced by trans people. Without such protections, visibility alone can expose trans people to greater levels of discrimination. This includes official documentation or client records that disclose a trans person’s original sex details and therefore identify the person as trans.

In 2009, trans people raised their concerns with Statistics New Zealand that the statistical standard for sex required trans people to respond to questions based on their biological sex. In 2010, Statistics New Zealand reviewed this standard, which addressed these concerns while still ensuring that the standard would produce robust data. The resulting revised Statistical Standard for Sex now provides guidelines enabling people to be classified to the appropriate sex once they have started to transition and live as that sex.⁵³ This has been welcomed by members of the trans community.⁵⁴

The revised standard includes guidelines for the collection and output of ‘indeterminate’ sex data where required in administrative data sets. Currently, this is used in only a limited number of administrative data sets, including the Department of Internal Affairs’ register of births. The classification of ‘indeterminate sex’ may also be added to death and civil union (but not marriage) register entries. The Commission and some intersex people submitted that a third sex category, ‘indeterminate’, is the most accurate reflection of some people’s sex. Therefore, they recommended adding this third option to the standard so that it could be used for all official data-collection purposes. Statistics New Zealand has indicated interest in undertaking further background work on the collection of data on gender identity, as distinct from sex.⁵⁵

48 Human Rights Commission (2009), Submission to Statistics New Zealand on the Culture and Identity Statistics Domain Plan: Draft for Consultation

49 Statistics New Zealand (2008), *Considering Sexual Orientation as a Potential Official Statistic: Discussion Paper* (Wellington: StatsNZ).

50 Pega F, Gray A and Veale J (2010), ‘Sexual orientation data in probability surveys: Improving data quality and estimating core population measures from existing New Zealand survey data’, *Official Statistics Research Series*, 2010–2

51 *ibid*, p 2

52 See Human Rights Commission (2008), *Inquiry into Discrimination Experienced by Transgender People: To Be Who I Am – Kia noho au ki tōku ano ao* (Wellington: HRC)

53 Accessed 13 August 2010 from http://www.stats.govt.nz/methods_and_services/surveys-and-methods/classifications-and-standards/classifications-and-related-statistical-standards/sex/definition.aspx

54 Accessed 13 August 2010 from <http://www.gaynz.com/articles/publish/2/article9110.php>

55 Human Rights Commission consultation meeting with Statistics New Zealand on the review of the Statistical Standard for Sex, 6 May 2010

COMPLAINTS OF DISCRIMINATION

Complaints by sexual and gender minorities comprise a small but persistent group of complaints to the Human Rights Commission. Some forms of discrimination are similar to those experienced by other marginalised groups. For example, employment discrimination is a common area of complaint, whether based on a person's sexual orientation, sex, gender identity, race, age or disability. Recent changes in employment law allowing employers to place new employees on a 90-day trial period have raised concerns that employees will be dismissed on grounds prohibited under the Human Rights Act. This concern applies to sexual orientation and sex (including gender identity) as well as other grounds. Other complaints are specific to the experiences of sexual and gender minorities. In addition, racism and poverty may compound the discrimination some may face.

The Commission received 241 approaches relating to sexual orientation human rights issues between 2005 and 2009. The major areas of complaint related to discrimination (particularly within employment and when accessing goods and services), safety in schools, lack of official sexual-orientation data, the inability of same-sex couples to legally adopt or to marry, restrictions on blood donations, and the situation of lesbian and gay clergy.

Since the 2004 report, the number of complaints and inquiries to the Commission about discrimination faced by trans people has increased. There were a total of 272 such complaints and inquiries between 2005 and 2009.

Prior to the start of the Transgender Inquiry in 2006, the number of trans people approaching the Commission was relatively low. The inquiry process built greater community awareness that trans people are protected from discrimination based on their gender identity. A fuller outline of progress made since the inquiry, including in response to experiences of discrimination, is set out later in this chapter.

Approximately one third of trans people approaching the Commission sought general information, including about the Transgender Inquiry. The main areas of specific concern were discrimination (particularly in employment, housing, at school and in public places), the requirements for changing sex details on official documents and access to health services.

The small number of complaints and enquiries the Commission received from intersex people between 2005 and 2009 reiterated issues raised in submissions to the Transgender Inquiry. These included significant concerns about medical procedures performed on children and young people with intersex conditions. Intersex adults faced major difficulties trying to access medical records that would confirm their intersex condition or the medical interventions that have taken place.

The data given here is drawn from complaints and enquiries to the Commission as part of its everyday work. In addition, 83 per cent of the 128 submissions to the Transgender Inquiry documented experiences of discrimination. These experiences were so commonplace that

HOMOPHOBIA AT A GARAGE

What happened

Mark, a gay man, worked as a mechanic in a garage. His workmates knew he was gay and harassed him regularly at work about his sexual orientation, calling him a "faggot" and other insulting names. He tried to ignore it, but it was extremely distressing and he found it increasingly difficult to concentrate on his job. Mark reached his limit when he arrived at work to see a pornographic picture displayed in the workplace, with writing on it directed at him. He resigned and complained to the Commission.

The disputes-resolution process

The employer investigated the allegations and attended a mediation meeting with Mark. Mark's co-workers had admitted to the behaviour.

The outcome

The employer paid Mark \$3000 in compensation and agreed to promote the company's anti-harassment policies more vigorously on the workshop floor. They also promised to establish a process for complaints.

CLUB APPEALS AGAINST TRANS CRICKETER

What happened

After a game of women's club cricket, the losing team complained to the local cricket association that the winning team had included a trans woman. It asked that the club's winning points be taken away. The player's club supported Anne's right to play. It asked her to provide information about her gender identity and history playing for another association so it could report back to the local association. Anne contacted the Commission for information about her rights under the Human Rights Act so she could pass this on to her club.

The disputes-resolution process

The Commission told Anne the view of the Commission and the Crown Law Office is that trans women are covered under the HRA, as outlined in the Transgender Inquiry report. A trans woman who had taken decisive steps

to live as a woman should be recognised as such and should be free from discrimination under the ground of sex. However, the HRA also includes a sport exception, which allows women-only and male-only sports where strength, stamina or physique are relevant. This meant it was necessary to also consider whether other female competitors would be disadvantaged by competing against a trans woman. The Commission told Anne that overseas sporting organisations are increasingly taking into account the impact that taking female hormones for a number of years would have in reducing any competitive advantage a trans woman might have over other women.

The outcome

The information was passed on to the cricket association, which ruled that Anne was eligible to play and supported her right to do so.

many trans people simply expected to be discriminated against. Submissions from health professionals, family members, unions and academics reinforced the obstacles to dignity, equality and security faced by both trans and intersex people in New Zealand.

PARTICIPATION

Participation includes the rights to participate in public and cultural life, freedom of expression, freedom of association and assembly, and the rights to found and form a family. New Zealand families are becoming increasingly diverse, to the extent that blended, sole parent, and lesbian and gay parented families are becoming an increasing proportion of family groupings. Yet research has revealed that lesbians and gay men can still face significant challenges in their rights to create and maintain a family.⁵⁶

New Zealand case law reinforces the point that the sexual orientation of parents is immaterial when considering custody or access issues.⁵⁷ The determining issues are the best interests of the child and good parenting. Similar case law does not exist in relation to trans or intersex parents, although discrimination issues were raised by trans parents in the Transgender Inquiry. Complaints received by the Commission indicate that some trans parents face significant barriers in Family Court hearings, including expert reports that assume children will be negatively affected if they have a trans parent.

Discrimination is unlawful and prevents participation in public life. There is also evidence that it is likely to affect the health and well-being of marginalised groups.⁵⁸ There is direct evidence linking personal experience of racial discrimination to poorer health outcomes for

56 Gunn A and Surtees N (2009), *We're a Family: A Study of How Lesbians and Gay Men Are Creating and Maintaining Family in New Zealand* (Wellington: Families Commission)

57 Atkin B, Henaghan M, Caldwell J, Webb D, Clarkson D and Partridge D (2009), *Butterworths Family Law in New Zealand* (14th ed, Wellington, LexisNexis); Neate v Hullen [1992] NZFLR 314; Judge Mahony in VP v PM (1998) 16 FRNZ 621

58 Ross L E, Dobinson C and Eady A (2010), 'Perceived Determinants of Mental Health for Bisexual People: A Qualitative Examination', *American Journal of Public Health* 100(3), pp 496–502

Māori.⁵⁹ In addition, both sexual⁶⁰ and gender minorities⁶¹ report negative experiences when seeking and receiving health care. Discrimination based on both race and gender identity may compound the negative health impacts for takataapui, whakawāhine, tangata ira tane, fa’afafine and other Māori and Pacific sexual and gender minorities.

TRANSGENDER INQUIRY

In January 2008, the Commission released the report *Inquiry into Discrimination Experienced by Transgender People: To Be Who I am – Kia noho au ki tēku anā ao*.⁶² The inquiry focussed on three areas: experiences of discrimination, access to health services and barriers to legal recognition of gender status. Its final report documented obstacles to dignity, equality and security and how discrimination impacted on all aspects of trans people’s lives.

The inquiry identified major gaps in availability, accessibility, acceptability and quality of medical services required by trans people, including those needed in order to physically transition. Many of the health services required by trans people were available within the public health system for other medical conditions (for example, access to hormone specialists, assessments by mental health professionals and some surgical procedures, including mastectomies and orchidectomies). However, trans people and their clinicians faced significant barriers to accessing these procedures.

The inquiry also found that many, if not most, trans people could not obtain official documents that provided consistent and accurate information about their gender identity and sex.

The final report made five recommendations:

- enable effective participation by trans people in decisions that affect them
- reduce discrimination and marginalisation experienced by trans people (starting with three priority areas: employment, education and safety)
- improve trans people’s access to public health services and develop treatment pathways and standards of care for gender reassignment services
- simplify the requirements for changing sex details on birth certificates, passports, and other documents to ensure consistency with the Human Rights Act
- further consider the specific human rights issues facing intersex people.

The Minister of Justice directed the Ministry of Justice to oversee government agencies’ progress in assessing and implementing the inquiry recommendations. Since the report was released, some significant progress has been made, including:

- allowing Family Court declarations (under sections 28 and 29 of the BDMRRA) to be made for overseas-born New Zealand citizens and permanent residents, as well as applicants born in New Zealand
- the Department of Internal Affairs revising policies for changing sex details on passports and evidentiary citizenship certificates in line with the *Re Michael* case, so that a Family Court declaration is sufficient – and therefore evidence of full sex-reassignment surgery will not always be necessary
- the Department of Labour developing *Transgender People at Work* guides for employers and employees⁶³
- dialogue sessions between trans people and a range of government agencies on search and detention issues
- an extensive human rights education programme on human rights issues for trans people, co-ordinated by

59 Harris R, Purdie G et al (2007), Appendix 3: Estimating Māori hospitalisations and cancer registrations. In Robson B and Harris R (eds), *Hauora: Māori Standards of Health IV. A study of the years 2000–2005* (Wellington, Te Rōpū Rangahau Hauora a Eru Pōmare), pp 249–259

60 Neville S and Henrickson M (2006), Perceptions of Lesbian, Gay and Bisexual People of Primary Health Care Services, *Journal of Advanced Nursing* 55(4), pp 407–415

61 Human Rights Commission (2008)

62 *ibid*

63 Department of Labour (2009), *Transgender People at Work: Guide for Employers* (Wellington: DoL). Accessed 13 August 2010 from <http://www.ers.dol.govt.nz/publications/transgender/transgender-people-employers.pdf>

the Commission and supplemented by online resources and a quarterly email newsletter⁶⁴

- funding for Counties Manukau District Health Board to work with trans people and clinicians to develop training resources, and provide health practitioners nationally with a 'how-to' manual, including details of health professionals who can be contacted as a resource.⁶⁵

The inquiry found that many trans people and groups were not aware of existing legal protections. It concluded:

"There must be no doubt that trans people are protected from discrimination under the HRA, and that section 21(1a) should be amended to state clearly that sex includes gender identity. That recommendation has not been adopted because, based on Crown Law advice, the Attorney-General has concluded that gender identity is already included under the prohibited ground of sex.

However, the implications of this legal interpretation have not yet been tested. In the absence of a specific reference to gender identity, the full protection of gender minorities from discrimination remains uncertain.

The inquiry recommended changes to the "physical conformation" threshold in section 28 of the BDMRRA to include anyone who "has taken decisive steps to live fully and permanently" in their new gender identity. Subsequently, the Family Court ruling in *Re Michael* clarified that is not always necessary for trans people to have had all gender-reassignment surgeries before the court will grant a declaration amending sex details on birth records. The Commission understands that this decision has simplified the process and threshold for a number of trans men making Family Court applications. It is important that clear information is available to trans people about the Family Court process and, in particular, the criteria for demonstrating that they have taken "decisive steps to live fully and permanently in the gender identity of the nominated sex".

As a result of this court decision, some government agencies have indicated that the inquiry's recommended change to the physical conformity threshold in section 28 of the BDMRRA is no longer necessary. However, the Family Court decision focussed in part on irreversible chest surgery undertaken by the man concerned. Given that many trans women do not undergo an equivalent irreversible surgical procedure prior to genital surgery, the Commission considers that it is unclear whether the threshold has improved for trans women.

New Zealand law does not clearly state that trans people do not need to undergo medical or surgical steps that result in sterilisation in order to change sex details on official documents. Currently, under New Zealand law, a trans person may or may not be required to undergo sterilisation in order to change the sex on their birth certificate.⁶⁶ In the *Re Michael* decision, the applicant was able to obtain a male birth certificate without having undergone a hysterectomy. However, the Commission has been informed of other decisions where trans women have been required to show evidence of full sex-reassignment surgery. Emerging international standards, including a June 2010 recommendation from the World Professional Association of Transgender Health, state that sterilisation should never be required before someone can change sex details on official documents.⁶⁷

While not all trans people wish to have all available surgeries, for others it is an essential step – it is very important that continued efforts are made to improve access to surgery for trans people.

Priority areas where considerably more work is needed to implement the Transgender Inquiry recommendations include:

- amending the HRA to state explicitly that discrimination on the grounds of gender identity is prohibited under the ground of sex

64 Accessed 13 August 2010 from <http://www.hrc.co.nz/transgenderinquiry>

65 Information about the 'Gender-Reassignment Health Services for Trans People within New Zealand' project. Accessed 13 August 2010 from <http://www.healthpoint.co.nz/default,180057.sm>

66 The legal test combines a mix of subjective and objective elements, of which physical conformation is only one component.

67 Accessed 16 July 2010 from <http://www.wpath.org/>

- amending the physical conformity threshold in section 28 of the BDMRRA 1995
- sharing best practice so that trans students' right to education is fully protected
- building on the Counties Manukau District Health Board project to develop standards of care and treatment pathways for trans people wishing to physically transition.

The inquiry process and subsequent advocacy by trans people have demonstrated what can be achieved through the use of a human rights approach. The momentum created by the inquiry is ensuring that trans people are able to participate in matters that affect them and use the human rights framework as leverage for change.

INTERSEX PEOPLE

Sometimes it's nice to have a label – sometimes it just gets in the way.

Intersex roundtable participant, July 2009.

Terminology remains an issue when discussing the human rights of intersex people or those with an intersex medical condition. As already noted, some people are uncomfortable with the term 'intersex' itself.

There is very little data on intersex people in New Zealand. Data gathered overseas suggests that between one in 1500 and one in 2000 babies are born with intersex medical conditions.⁶⁸ Intersex issues are distinct from sexual orientation and gender identity, although there are some overlaps, particularly for those intersex people seeking to reverse previous medical interventions.

The Commission's Transgender Inquiry received submissions from intersex people which raised significant human rights issues. Priority concerns were about medical procedures performed on children and young people with intersex conditions. In addition, limited access to medical records compounded the invisibility, secrecy and shame that many intersex people experienced.

In 2009 and 2010, the Commission brought together intersex people, their families, health professionals,

government agencies and others to discuss the issues raised by the Transgender Inquiry and international developments.⁶⁹ These meetings highlighted work already being done in New Zealand, including:

- Intersex Trust of Aotearoa NZ provides information, education and training for organisations and professionals who provide services to intersex people. The trust has worked with the Commission to run public education programmes, including alongside the Assume Nothing exhibition.
- CAHNZ Trust provides support to people in New Zealand about Congenital Adrenal Hyperplasia, including an information kit for parents.
- A neonatal nurse specialist has created a brochure for parents when their baby's gender is uncertain at birth.
- A small number of universities and medical schools provide training on intersex issues to midwifery and medical students.
- Medical students in Auckland are given a lecture on intersex issues.
- The Ministry of Social Development contributed to raising awareness among government agencies and community groups.
- The Commission has worked with Intersex Trust Aotearoa New Zealand to run public education programmes, including alongside the Assume Nothing exhibition.

Other challenges include creating a safe environment for reaching more intersex people, in a context in which discrimination and stigmatisation remain prevalent. The ongoing impact of past medical interventions on the lives of intersex people was also emphasised, as well as the need to take into account the experiences of adult intersex people when making an 'evidence-based' decision about a child's sex.

How do we as individuals, as communities, as whānau, as families deal with difference?

How do we create safe spaces to talk about genitals, sex, gender, difference, shame, fear and trauma?

68 Blackless M, Charuvastra A, Derryck A, Fausto-Sterling A, Lauzanne K and Lee E (2000), 'How Sexually Dimorphic Are We? Review and Synthesis', *American Journal of Human Biology* 12, pp 151–166. Accessed 15 November 2010 from <http://www.isna.org/faq/frequency>

69 Intersex roundtable minutes (2010), accessible online at <http://www.hrc.co.nz/home/hrc/humanrightsenvironment/actiononthetransgenderinquiry/intersexpeople.php>

How do we repair the damage from the past?

How do we gather up all this knowledge and move forward, in a way that is rich, safe and powerful for all of us?

Intersex dialogue, Northland, 2010

Over the past year, significant media attention has been paid to the participation of intersex people in public life – for example, South African runner Caster Semenya being required to undergo medical tests after winning a gold medal at the 2009 world championships. This has highlighted the vulnerability of exposing someone's intimate personal details, resulting in public discussion about whether that person is intersex. Such debates deny an individual's right to privacy and to choose their own identity.

In New Zealand, the issue provided a focal point for advocacy by intersex people. It has now been confirmed that Caster Semenya is legally entitled to compete as a woman.⁷⁰ It is crucial that intersex people are able to participate in the development of international sporting standards. The purpose of such standards should be to ensure that intersex people can participate fully and fairly at all levels of sport and enjoy their right to privacy.

Other roundtable suggestions for improving protection of the human rights of intersex people in New Zealand included:

- ensuring that intersex health issues are part of curriculum studies and integrated into training for a wide range of health professionals, including doctors, social workers, nurses and midwives
- developing standards of care and consensus guidelines, and an emphasis on providing holistic healthcare services
- providing transition from paediatric health care to ongoing healthcare for intersex people, in order to

address the health complications that may arise later in life

- avoiding any surgical interventions until the child is old enough to give informed consent, except in those very limited circumstances where surgical intervention is necessary to preserve life
- improving understanding around informed consent and the rights of children and their parent(s), and ensuring that parents and competent young people are made aware of the differing views about medical or surgical interventions before making any decisions⁷¹
- increasing availability and quality of information and support for families
- improving data collection and ongoing monitoring of issues affecting intersex people
- increasing resourcing available for the work done by intersex organisations, and continuing to raise awareness among government agencies of the needs of intersex people.

SECURITY

Security and safety remain important issues for sexual and gender minorities, particularly trans and intersex people. A significant development in the past decade has been deeper understanding of gender-based violence – namely violence based on actual or perceived sex, gender, gender identity or sexual orientation.⁷² Gender-based violence includes, for example, violence against men who are, or are perceived to be, effeminate or homosexual or otherwise not to conform to social expectations of male roles or behaviour. The use of violence against people based on their actual or perceived sexual orientation, gender identity or sex is frequently grounded in misogyny and what it means to be a 'real' man or woman. Understanding this rationale exposes why, for example, the use of provocation as a defence to a murder charge has been so repugnant to sexual and gender minorities.⁷³

70 International Association of Athletics Federation (2010), 'Caster Semenya May Compete'. Accessed 16 July 2010 from <http://www.iaaf.org/aboutiaaf/news/newsid=57301.html>

71 Right 6 of the Code of Health and Disability Services Consumer's Rights requires that every consumer is given an explanation of the options available, including an assessment of the risks, side-effects, benefits and costs of each option.

72 Violence against women is dealt with in the chapter on human rights and women.

73 For example, see Herkt D (2009), "'Our Sophie" vs that horny old fag', *gaynz.com*, 4 August. Accessed 13 August 2010 from http://www.gaynz.com/articles/publish/5/article_7757.php

The high New Zealand levels of family violence and violence against women have been commented on in successive international human rights reports. The levels of reported violence have increased and remain persistently high, despite proactive public-awareness campaigns and legislative initiatives. More than a quarter of submissions to the Transgender Inquiry raised concerns about the harassment, security and safety of trans people. These included examples of trans people who had been violently assaulted and hospitalised because of their gender identity.

Some progress has been made in removing legal barriers to protection of sexual and gender minorities with the repeal of the defence of provocation in 2010. Challenges remain, including the continuing lack of data about the use of provisions in the Sentencing Act 2002 that enable a court to take into account whether offending was motivated by a victim's sexual orientation or gender identity. In developing this report, the Commission received submissions calling for the extension of sections 61, 63 and 131 of the HRA to cover hate speech against sexual and gender minorities.

New Zealand Police has 'police diversity liaison officers', whose role includes liaison with queer and trans communities. The Human Rights Commission has worked with the police on developing suitable policies for searching trans people. The Commission has also engaged in dialogue with the Department of Corrections as a first step in implementing the inquiry recommendation to "bring together government agencies to share best practices for the search, detention and imprisonment of trans people".

Safety and security is a particular issue for young people, especially those who identify as queer or belonging to other sexual minorities. The Youth 2007 Survey analysed responses from more than 8000 secondary-school students about outcomes for same-sex-attracted and both-sex-attracted students. The survey revealed high levels of resilience and vitality among queer youth, and some health improvements since 2001. However, it also revealed higher levels of bullying, depression and suicide attempts experienced by these students compared with

opposite-sex-attracted students.⁷⁴ The survey included no data on trans youth.

There is limited New Zealand research about the level of harassment and bullying of trans and intersex students. However, overseas studies and submissions to the Transgender Inquiry suggest that levels are at least as high as those for same-sex-attracted and both-sex-attracted students. Trans and intersex students face additional barriers linked to their gender identity or sex diversity. These may include not being able to participate in sex-specific activities (such as sport), use sex-segregated facilities (such as toilets), or express their sex/gender identity (for example, through using the appropriate name and pronoun on school rolls or wearing the appropriate school uniform).

The cumulative impact of discrimination, harassment and barriers on trans/gender-variant and queer youth can be serious, and may be linked to the high levels of depression and suicide found in the Youth 2007 survey. Young people who identify as queer or trans may also be more vulnerable to violence at school and at home. Responses to these safety issues have to move beyond individual students and their families and towards effective policies, training and resources within schools. At the moment, non-government organisations such as Rainbow Youth are addressing these needs without adequate resources to do so.

Improved sexual-health education and provision in schools could reduce stigma against sexual minorities. A priority area for further action is ensuring that all children and young people have access to high-quality comprehensive sexuality education. This education should address identity-based discrimination and incorporate a universal approach to sexual and reproductive rights.

Conclusion Whakamutunga

New Zealand generally complies with international human rights standards that provide for non-discrimination and equal treatment of sexual and gender minorities.

⁷⁴ Denny S and Grant S (2009), *Youth '07: The Health and Well-being of Secondary School Students in New Zealand: Results for Young People Attracted to Same Sex or Both Sexes* (Auckland: University of Auckland)

Significant progress has been made towards better protection of the rights of sexual and gender minorities in New Zealand. Since 2004, 1876 civil unions have been registered, many of which were same-sex unions. Efforts have been made to improve co-ordination and delivery of government services to sexual and gender minorities. Some progress has been made towards addressing concerns and gaps in relation to data collection.

The Commission's inquiry into the experiences of transgender people identified key areas for improvement, and the Ministry of Justice was directed to oversee government progress in addressing the inquiry recommendations. Significant progress has been made in implementation of these recommendations. In 2009 and 2010, the Commission hosted roundtable discussions about the human rights issues affecting intersex people, at which areas of progress were also identified.

Gaps and uncertainties remain around rights to found and form a family, protection from discrimination on the basis of gender identity, and the legal ability for trans and intersex people to change sex details on official documents. Challenges also remain in relation to implementation and practice, including promoting public understanding of sexual and gender diversity, combating discrimination and harassment, official data collection and improving safety.

The Commission consulted with interested stakeholders and members of the public on a draft of this chapter. The Commission has identified the following areas for action to advance the rights of gay, lesbian, bisexual, trans and intersex people:

Legal equality

Completing the legislative steps required for formal legal equality, including rights to found and form a family, regardless of sexual orientation or gender identity.

Data collection

Continuing to work with Statistics New Zealand, and commencing working with other producers of official statistics, to address the need for sexual orientation statistics through the Census and population-based surveys.

UN reporting

Addressing human rights in relation to sexual orientation and gender identity in all New Zealand country reports to United Nations human rights treaty bodies and in other human rights reports.

Rights of trans people

Continuing to improve the human rights of trans people through implementation of the Transgender Inquiry recommendations, with particular focus on legal recognition, the rights to education and health, and explicit protection under the Human Rights Act.

Gender-based violence

Taking steps to reduce gender-based violence.

Children and young people

Improving the safety of same-sex-attracted and both-sex-attracted, trans and intersex children and young people in schools.

Intersex people

Building understanding about the specific human rights issues faced by intersex people.

Health needs of intersex people

Using a human rights-based framework to develop best practice for meeting the health needs of intersex people, with a particular focus on infants with intersex medical conditions.